

SUMMARY OF
MAJOR ELEMENTS OF THE PROPOSED EPA DBE RULE
AND PREAMBLE

I. Major changes from current requirements

A. Name Change - The program will be called EPA's DBE program. A DBE is defined as an entity owned and/or controlled by an individual who is socially and economically disadvantaged under either EPA's 8% or 10% statutes, as well as a SBE, a labor surplus area (LSAF) firm or a SBRA. THIS IS NEW.

B. Certification.

1. Under the proposal there would be three changes to the current certification requirements in order to satisfy *Adarand's* strict scrutiny analysis.

i. No longer accept MBE self certification.

ii. Recognize MBE certifications (certification of entities as owned and/or controlled by a socially and economically disadvantaged individual under EPA's 8% or 10% statutes by a State, local and Tribal governments and private certifiers so long as their criteria match those under Section 8(a)(5) and (6) of

the Small Business Act and SBA's 8(a) Business Development Program regulations.) (We currently accept State certifications without their having to adhere to these criteria).

iii. Clarify that EPA will accept DOT DBE certifications as valid certifications under our program if EPA citizenship requirements are met.

2. EPA would require that an entity first try to become certified as an MBE or WBE by the SBA or DOT under their respective programs or by Tribal Governments, State Governments, local Governments or independent private organizations consistent with EPA's 8% or 10% statute as applicable. An entity may only apply directly to EPA for MBE or WBE certification under the procedures set forth in §33.205 of the proposed rule if that entity first is unable to obtain MBE or WBE certification under one of these programs.

EPA currently envisions five categories of individuals or groups who would not qualify for MBE or WBE certification program from SBA or DOT due to differences in those Agency's respective programs. These categories are:

- a. women-owned businesses (WBEs) and Minority -

owned businesses (MBEs) that do not meet the SBA/DOT size standards, (note- EPA does not have size criteria for its DBE program) [8% and 10% statutes];

- b. disabled American owned businesses [10% statute];
- c. private and voluntary organizations controlled by individuals who are socially and economically disadvantaged [10% statute];
- d. entities which are certified under criteria which are inconsistent with EPA's DBE Program criteria; [8% and 10% statutes]
- e. any entity claiming that it is owned or controlled by socially and economically disadvantaged individuals under EPA's 8% statute. [note - SBA and DOT both require a showing of both ownership and control]

- 3. WBEs would have to become certified as such.
- 4. A practical effect if these provisions are adopted is that individuals with a net worth greater than or equal to \$750K would be precluded from initial eligibility and individuals with a net worth greater than or equal to \$750K would be precluded from continued eligibility - this is a major change from our current

requirements which contain no dollar limits.

C. Good faith efforts - the 6 affirmative steps in 40 CFR Part 31 and the 6 positive efforts in 40 CFR Part 30 are being combined to be known as good faith efforts. THIS IS NEW.

D. Contract administration provisions

1. A recipient must be notified in writing by its prime contractor prior to any termination of a DBE subcontractor.

2. When a DBE subcontractor fails to complete its work under the subcontract for any reason, the recipient must require the prime contractor to make good faith efforts in hiring another subcontractor (i.e., must undertake the 6 affirmative steps/positive efforts again).

3. A recipient must require its prime contractor to make good faith efforts even if the fair share objectives are met.

4. A recipient must require its prime contractor to pay its subcontractor for satisfactory performance within a specific number of days from the prime contractor's

receipt of payment from the recipient.

5. A recipient must require the completion of a few new forms to prevent “bait and switch” tactics at the subcontract level by prime contractors which could circumvent the spirit of the DBE program. The forms would be completed either by prime contractors or DBE subcontractors, depending on the applicable form.

- E. Submission of fair share goals - the rule would require a recipient to submit its proposed fair share objectives and supporting documentation to the Agency no later than 90 days after its acceptance of the assistance award. THIS IS NEW (instead of relying on grant conditions to accomplish a similar result, which is what we have been doing for the past few years). A recipient would not be able to spend any of its financial assistance award for procurement until the fair share objective negotiation process has been completed. Costs of preparing an availability analysis or disparity study may be grant eligible depending on the specific fact situation - THIS IS NEW LANGUAGE FOR THE PREAMBLE ALTHOUGH NOT NEW AS A CONCEPT. EPA approved fair share goals would remain in effect for three fiscal years. If significant changes occur during that time period rendering the data obsolete, the recipient and EPA will renegotiate the goals.

F. Determining fair share goals - The big change from current requirements is that a non-State agency recipient would be able to use a State agency's MBE and WBE fair share objectives only if it uses the same or a substantially similar relevant geographic market for its procurement for construction, equipment, services and supplies.

1. In calculating fair share goals, after a recipient comes up with base figures for its MBE and WBE proposed fair share objectives through an availability analysis, a disparity study, using another recipient's goals, or alternative methods, it has to consider whether an adjustment from the base figures is appropriate, based on its past utilization of MBEs and WBEs in contracts under EPA financial assistance agreements, and other relevant information, e.g., disparity studies conducted within a recipient's relevant geographic area, statistical disparities in the ability of MBEs and WBEs to get necessary financing bonding and insurance.

G. Race and gender conscious efforts - to the extent good faith efforts prove to be inadequate to achieve the fair share goals for MBEs and WBEs, encourage a recipient or prime contractor to take reasonable race and/or gender conscious action to the extent necessary to more closely achieve the fair share goals, including

price incentives and technical evaluation credits. Prior notification of the contemplated action to EPA is required.

- H. Exemptions - EPA is proposing to exempt recipients of an EPA financial assistance agreement in the amount of 250K or less for any single assistance agreement, or of more than one financial assistance agreement with a combined total of 250K or less in any one fiscal year from the fair share negotiations requirements.
- I. CWSRF, DWSRF, and Brownfields Cleanup Revolving Loan Fund (BCRLF) exemptions - EPA is proposing that recipients not be required to apply the fair share objective requirements to an entity receiving an identified loan in the amount of \$250K or less or to an entity receiving more than one identified loan with a combined total of \$250K or less in any one fiscal year.
 - 1. Recipients of identified loan projects could use State negotiated MBE/WBE goals if they used a substantially similar relevant geographic market - if not, they have to negotiate separate MBE/WBE fair share goals with the State based on demonstrable evidence of availability of MBEs and WBEs. If procurements will occur over more than one year, the recipients can

choose to apply the fair share objective in place either for the year in which the identified loan is awarded or for the year in which the procurement action occurs. The recipient must specify this choice in the financial assistance agreement or incorporate it by reference in that agreement.

- J. Other Exemptions - Grants to tribes and intertribal consortia that are eligible to be included in Performance Partnership Grants (PPGs) are exempt from fair share negotiations. Technical Assistance Grants (TAGs) are also exempted from the fair share negotiations requirements.
- K. Insular Areas and Tribes - the rule proposes the same fair share negotiation requirements as for other recipients, with a 3-year phase in to allow these recipients time to adjust to the change. In the interim, they would have to comply with the rule's other requirements. The Agency will develop guidance on what specific factors should be taken into account in determining the phase-in period for these recipients.
- L. Definitions - the rule defines a number of new terms, e.g., disparity study and others differently (e.g., MBE) from our current definitions.
- M. Record Keeping and Reporting

1. A recipient of a Continuing Environmental Program Grant (e.g., a state) or other annual grant would be required to create and maintain a bidders list. Such a list must only be kept until the grant project period has expired and the recipient is no longer receiving funding under the grant.
2. In addition, a recipient of an EPA financial assistance agreement to capitalize a revolving loan fund also must require entities receiving identified loans to create and maintain a bidder's list if the loan recipient is subject to, or chooses to follow competitive bidding requirements.
3. The purpose of a bidders list is to provide the recipient and entities receiving identified loans who conduct competitive bidding with as accurate of a database as possible about the universe of MBE/WBE and non-MBE/WBE prime and subcontractors.
4. Such a list must only be kept until the project period for the identified loan has ended. Recipients are required to comply with these record keeping requirements even if they are exempt from applying the fair share objective requirements.

- N. Waivers - the OSDBU director can grant waivers from any requirements of Part 33 that are not based on a statute or Executive Order.

II. Next Steps

- A. EPA will conduct a number of public hearings and Tribal hearings during the 180 day comment period for the rule.